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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1987

No. 87-2110

WILLIAM JONES,

Appellant

v.

CHARLES J. SCHAFFER, JR., Individually and as Administrator of the Teamsters Pension Trust Fund of Philadelphia and Vicinity
and
WILLIAM LEMON, VINCENT DAGEN FREDERICK W. FOX, JR., JOSEPH CIMINO, PETER P. COYLE and PAUL CARDULLO, Trustees of the Teamsters Pension Trust Fund of Philadelphia and Vicinity
and
CROSSMAN'S VAN AND STORAGE COMPANY, INC.

On Appeal from the United States Court of Appeals for the Third Circuit

MOTION TO DISMISS OR AFFIRM OR, IN THE ALTERNATIVE, BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI, FILED ON BEHALF OF CHARLES J. SCHAFFER, JR., WILLIAM LEMON, VINCENT DAGEN, FREDERICK W. FOX, JR., JOSEPH CIMINO, PETER P. COYLE, AND PAUL CARDULLO

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STATEMENT

Introduction

William Jones is presenting claims to this Court which have been successively rejected by: (1) the Trustees of the Teamsters Pension Trust Fund of Philadelphia & Vicinity ("Fund") (App. 12-13);[1] (2) an arbitrator selected under the auspices of the American Arbitration Association ("AAA") (App. 13); (3) United States District Judge Clifford Scott Green (Pet. App. 1-10); and (4) the United States Court of Appeals for the Third Circuit (App. 11-18). Thus, this Court is the fifth forum to consider the theories asserted against the Fund.

Jones is apparently confused as to the basis for jurisdiction in this Court. Page 3 of his self-styled "Jurisdictional Statement" asserts *both* that "[t]he present appeal is taken as a matter of right" and that "[j]urisdiction of this Court to review this case on petition for certiorari rests upon 28 U.S.C. §1254(1.)" No attempt is made to reconcile these contradictory claims. Nevertheless, the Court should decline to review the case, regardless of whether Jones is considered to be seeking relief by appeal or petition for a writ of certiorari.

Factual History

The Fund is a multiemployer benefit plan established pursuant to § 302(c)(5) of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 186(c)(5), and § 3(2), (3) and (37) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1002(2), (3) and (37) (App. 2). As such, the Fund is governed by Trustees appointed in equal numbers by management and labor who owe their exclusive fiduciary obligation to the Fund's participants and beneficiaries. *See NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981). The Fund is financed through contributions made by various employers pursuant to collective bargaining agreements with individual local unions. Section 302(c) (5) of the LMRA precludes the Fund from paying benefits

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1. All such citations are to the Appendix contained in the "Jurisdictional Statement."

to anyone other than employees (or family members or dependents of employees) who work in such bargaining units. *Walsh v. Schlecht*, 429 U.S. 401, 407 (1977).

Jones first went to work for Crossman's Van and Storage Co., Inc. ("Crossman Co.") as a truck-driver in 1955 employed in a bargaining unit represented by a Teamsters local union (App. 2). While employed in the bargaining unit, Jones' compensation and working conditions were, by law, governed by the operative collective bargaining agreements. For example, Crossman Co. compensated Jones on an hourly basis, paid his Social Security taxes, compensated him for vacations and holidays, and contributed on his behalf to the Fund (App. 4, 12).

Jones remained in the bargaining unit until 1972, when he entered into a private agreement with Crossman Co. pursuant to which he became a "commission driver," or independent contractor. Under this new arrangement, the terms and conditions of his employment were no longer regulated by the collective bargaining agreement. Rather, Jones received a commission for each shipment he transported for Crossman Co. (App. 12).

According to Jones' "Jurisdictional Statement," the change in status from bargaining unit member to commission driver was part of a nationwide conspiracy between transportation companies and unions to defray "petroleum-based fuel costs and vehicle expenses" (Jurisdictional Statement at 12-13). Nothing in the record supports this gratuitous allegation, which Jones never even mentioned, let alone substantiated, during any of the proceedings below. Yet the point is irrelevant, because the Fund is neither a union nor Jones' employer, but an independent trust fund which did not sanction or know of Jones' arrangement with Crossman Co.

The reason for the Fund's lack of knowledge is also undisputed. When Jones left the bargaining unit, Crossman Co. ceased making contributions to the Fund on his behalf. After that time, Jones made the contributions himself. The Fund cannot accept such contributions, because participation is limited to members of bargaining units whose employers contribute on their behalf pursuant to written labor agreements. To circumvent this problem, Crossman Co. and Jones devised a

scheme to make the payments on his behalf surreptitiously. With Jones' authorization, Crossman Co. deducted from Jones' commissions the money which Jones intended to invest in the Fund. Crossman Co. then forwarded these payments to the Fund, together with the contributions it made on behalf of its regular employees, and reported to the Fund that Jones was a member of the bargaining unit (App. 2, 11).

The Fund did not learn of the misrepresentation until Jones applied for his pension. Administrator Schaffer uncovered the facts while verifying Jones' employment history (App. 2, 12-13). There has never been any allegation, much less proof, that the Fund could have discovered this misrepresentation sooner, or that Jones was denied any rights under the reporting and disclosure provisions of ERISA. Furthermore, there is no dispute that the terms of the Fund's Pension Plan rendered Jones ineligible for benefits once it was established that Jones ceased being a member of the bargaining unit in 1972.

Procedural History

The administrative procedure which culminated in this litigation began on October 18, 1984, when the Fund's Administrator ruled that Jones was ineligible for a pension (App. 12). Jones then appealed to the Fund's Trustees (App. 3). On June 5, 1985, an appeals panel consisting of Trustees William Lemon and Peter P. Coyle met to consider the appeal. Jones was represented by counsel who presented evidence and argument to support the appeal. Jones requested two alternative forms of relief, *viz.*, a full pension or restitution of the payments which Jones made to the Fund on his own behalf (App. 3). Trustees Lemon and Coyle subsequently issued a written opinion which rejected both of these claims.

Pursuant to Article V, § I of the Fund's Pension Plan, Jones then appealed the Trustees' decision to binding arbitration under the auspices of the AAA (App. 3-4).[2] The arbitrator held

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2. Article V § I is very specific in providing that arbitration under the clause is binding. The relevant language of the section states:

> If the Participant or beneficiary is dissatisfied with the written

an evidentiary hearing at which Jones was represented by counsel who again requested either a full pension or restitution of Jones' payments. The arbitrator's opinion, issued on May 5, 1986, denied all of Jones' claims (App. 4-5).

Jones then initiated this litigation. The original complaint contained ten counts which set forth claims under the Racketeer Influenced Corrupt Organization Act, 18 U.S.C. §§ 1864, *et seq*. ("RICO"); ERISA; the Civil Rights Act of 1871; 42 U.S.C. §§ 1985(3) and 1986; the Pennsylvania Wage Payment Collection Law, 43 Pa.C.S.A. §§ 260.1, *et seq*.; and state common law theories of conversion, fraud, conspiracy, intentional infliction of emotional distress, and "punitive/exemplary damages" (App. 1-2). Defendants included the Fund's Administrator and Trustees, Crossman Co., and Ms. E. Crossman Hall. The RICO count was dismissed by stipulation of counsel, as were the individual claims against Ms. Hall (App. 1).

Judge Green issued an opinion on August 4, 1987, which granted defendants summary judgment with respect to the ERISA claims and dismissed all of Jones' remaining allegations for failure to state a claim upon which relief can be granted (App. 1-10). The United States Court of Appeals for the Third Circuit unanimously affirmed on March 25, 1988 (App. 11-17). Jones then filed this appeal. Appellees affiliated with the Fund submit the instant brief urging this Court to affirm the order of the district court.[3]

NOTES *(Continued)*

> decision of the Trustees, he shall have the right to appeal the matter to arbitration in accordance with the labor arbitration rules of the American Arbitration Association, provided that he submitted a request for arbitration to the Board of Trustees, in writing, within sixty (60) days of receipt of the written decision.
>
> . . . *The decision of the arbitrator shall be final and finding upon the Trustees and upon the appealing party*.

(App. 3-4, emphasis added).

3. This brief is submitted on behalf of the fiduciaries affiliated with the Fund: Charles J. Schaffer, Jr., the Fund's Administrator, and Trustees William Lemon, Vincent Dagen, Frederick W. Fox, Jr., Joseph Cimino, Peter P. Coyle, and Paul Cardullo. Mr. Fox has resigned as a Trustee since the initiation of this litigation.

SUMMARY OF ARGUMENT

The Court should dismiss this appeal for lack of subject matter jurisdiction. The Court of Appeals' opinion did not invalidate a state statute. Therefore, this Court does not have appellate jurisdiction.

If the Court does find that it has appellate jurisdiction, then the decision of the Court of Appeals should be summarily affirmed. Jones' claims under ERISA are barred by the preclusive effect of the arbitration award. Alternatively, Jones' plea for restitution lacks merit, because: (1) no such remedy exists under ERISA, (2) if such a remedy did exist, the equities of the case would preclude relief, and (3) if relief were appropriate, the recovery should only be granted against Crossman Co., which caused and benefited from any injury suffered by Jones. The claims under 42 U.S.C. §§ 1985(3) and 1986 fail, because Jones has not accused the defendants of discriminating against a group protected by these statutes. Jones' state law theories are preempted by ERISA.

Finally, if the Court elects to consider the "Jurisdictional Statement" as a petition for writ of certiorari, then the petition should be denied. The decision of the Court of Appeals was clearly correct. Perhaps more significantly, the Court of Appeals declined to publish its opinion. The Internal Operating Rules of the Third Circuit clearly establish that an unpublished opinion does not constitute a binding precedent. Therefore, the instant case is of no interest to anyone other than the parties, and does not, in any event, deserve this Court's attention.

ARGUMENT

I. THE APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

According to 28 U.S.C. § 1254(2), this Court has appellate jurisdiction in cases where the appellant relies "on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States." Section 1254(2) is construed strictly, with doubtful situations resolved

against appellate jurisdiction. *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 43 (1983). Consistent with this principle of strict construction, § 1254(2) will not provide jurisdiction unless the state statute in question was specifically raised and "expressly" invalidated in the opinion under review. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 247 (1984).

The legal arguments contained in the instant Jurisdictional Statement are based exclusively upon ERISA, a federal statute, the validity of which is not in question (Jurisdictional Statement at 7-13). At no point does Jones claim that he deserves relief under a state statute which the Court of Appeals held "repugnant" to federal law. This, alone, requires dismissal of the instant appeal.

The fact that Jones included the Pennsylvania Wage Payment Collection Law, 43 Pa. C.S.A §§ 260.1, *et seq.* ("WPCL"), among the state law claims that were unsuccessfully asserted before the District Court does not support appellate jurisdiction. Jones did not specifically discuss the constitutionality of the WPCL in his brief to the Third Circuit, and the Court of Appeals did not even mention the statute in its opinion. The only indirect reference to the preemption issue in the Court of Appeals' decision consisted of the following sentence: "We have considered the other issues raised on appeal by Jones, *i.e.*, that the district court erred by dismissing Jones' claims under the Civil Rights Act of 1871 and his state law claims, and conclude that dismissal was proper" (App. 16). Furthermore, Jones has not raised the constitutionality of the WPCL in his Jurisdictional Statement. Under these circumstances, the validity of the state statute was not "expressly" resolved.

Silkwood v. Kerr-McGee confirms the absence of appellate jurisdiction. *Silkwood* involved the validity of a jury verdict of punitive damages in favor of the plaintiff. A state statute specifically authorized punitive damages in such cases. The Court of Appeals for the Tenth Circuit overturned the award as preempted by federal law. The plaintiff attempted to appeal to this Court, arguing that the Tenth Circuit had "necessarily held that the state statute was unconstitutional, at least as applied in this case." 464 U.S. at 246. This Court held that it lacked

appellate jurisdiction, noting that § 1254(2) is limited to situations where a state statute "is *expressly* struck down on constitutional grounds," and does not reach cases where "an exercise of authority under state law is invalidated without reference to the state statute." 464 U.S. at 247 (emphasis added). As the *Silkwood* opinion explained:

> The Court of Appeals held that because of the preemptive effect of federal law, "punitive damages may not be awarded in this case." 667 F.2d, at 923. [*The Court of Appeals] did not purport to rule on the constitutionality of the Oklahoma punitive damages statute. The court did not mention the statute, and the parties did not contest or defend the constitutionality of the statute in their appellate briefs*. While the award itself was struck down, the statute authorizing such awards was left untouched. *Cf., Perry Education Assn.*, 460 U.S. at 42. Therefore, the present appeal is not within our § 1254(2) appellate jurisdiction.

Id. at 247 (footnote omitted, emphasis added).

The present situation is controlled by *Silkwood*. As in that case, the Court of Appeals did not purport to rule on the constitutionality of the state statute. At most, the Court of Appeals' opinion invalidated "an exercise of authority under state law without reference to the state statute." The WPCL remains fully in effect. Consequently, *Silkwood* mandates dismissal of the appeal.

II. THE COURT OF APPEALS CORRECTLY FOUND THAT JONES' ERISA CLAIMS ARE BARRED BY THE ARBITRATION AWARD.

The Court of Appeals held that the arbitration award in favor of the Fund precluded Jones from re-litigating his ERISA claims (App. 13-16). That conclusion fully comported with the precedents of this Court, which recognize that an arbitration award is final and binding on the merits of any dispute which the parties have agreed to arbitrate. *United Paperworkers International Union v. Misco*, 108 S.Ct. 364, 371-73 (1987).

Jones' Jurisdictional Statement offers only one argument to circumvent the arbitration award. Specifically, Jones cites *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981) for the proposition that "the arbitrator's determination relative to William Jones is not *res judicata* for an ERISA claim" (App. 11). This contention lacks merit.

Barrentine did not involve a claim under ERISA. Rather, the Court held that a suit for minimium wages under the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et. seq.* ("FLSA"), is not barred by an arbitration award. The Court reached that decision only because a careful review of the structure, purpose, and legislative history of the FLSA dictated that result. 450 U.S. at 727-46. In short, *Barrentine* is a very narrow decision, and Jones has not identified anything in the language or legislative history of ERISA which would justify a similar result here.

To the contrary, the Court of Appeals correctly found that the instant case falls within the logic of *Shearson/American Express v. McMahon*, 107 S.Ct. 2332 (1987)(App. 15). *Shearson* concerned the enforceability of an agreement to arbitrate claims arising under § 10(b) of the Security Exchange Act, 15 U.S.C. § 78j(b) and RICO. This Court held that the "duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights." 107 S.Ct. at 2337. To overturn an agreement to arbitrate a particular statutory right, a litigant must prove "that Congress intended to preclude a waiver of judicial remedies for the rights at issue." *Id.* Since no such legislative intent could be demonstrated with respect to § 10(b) or RICO, the duty to arbitrate was upheld. 107 S.Ct. at 2330-46. *Accord, Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 631-40 (1985) (federal antitrust claims).

Shearson and *Mitsubishi Motors* establish that an agreement to arbitrate will be enforced, even for very complex federal statutory claims, unless, as in *Barrentine*, the party opposing the agreement can establish that Congress intended to preclude such a waiver. Jones has not identified anything in ERISA, its legislative policy, or its underlying purpose that would even vaguely rebut the presumption in favor of enforcing the results

of the arbitration. Furthermore, he has not cited any authority to rebut the Court of Appeals' contrary finding that the legislative history of ERISA in fact *encourages* non-judicial remedies, such as arbitration (App. 15).[4] Therefore, if appellate jurisdiction exists, then the decision below must be affirmed.[5]

III. ASSUMING ARGUENDO THAT THE ARBITRATION AWARD IS NOT BINDING, JONES' ERISA CLAIMS FAIL ON THE MERITS.

If the Court were to reach the merits of Jones' ERISA claims, then the inquiry would be quite limited. Nothing in the Jurisdictional Statement provides a legal basis for reversing the decision below that Jones is ineligible for a pension. Rather, the *only* substantive ERISA issue argued in any detail is Jones' claim that the Court should award him the payments he covertly made to the Fund (Jurisdictional Statement at 7-10). This request must be denied with respect to the Fund for three reasons. *First*, no right of action for "restitution" exists under ERISA. *Second*, if such a right did exist, the equities of the situation would militate against relief in this case. *Third*, if any relief is appropriate, it

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4. *See* the discussion of ERISA's legislative history in *Grossmuller v. International Union*, 715 F.2d 853, 856-57 & n.3 (3d Cir. 1983).

5. The Courts of Appeals for the Sixth and Seventh Circuits have upheld pension plan provisions which require the arbitration of ERISA claims. *Delaney v. Union Carbide Corp.*, 749 F.2d 17, 18-19 (6th Cir. 1984); *Challenger v. Local Union No. 1, Ironworkers*, 619 F.2d 645, 647-49 (7th Cir. 1980).

Jones' reliance upon *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984) is misplaced. The plaintiffs in that case had been laid off after a plant closing and their union filed a grievance claiming that the order in which the employees had been laid off violated the governing collective bargaining agreement. An arbitrator rejected the grievance. The employees then sued under § 510 of ERISA, 29 U.S.C. § 1140, alleging that the employer had fired them in order to prevent them from vesting in their pension rights. The Ninth Circuit held that the contractual issues in the arbitration were so different from those in the ERISA case, that the loss of the arbitration could not bar the ERISA action under principles of *res judicata*. *Amaro* is totally inapposite to this case, where Jones is trying to assert the *identical* ERISA claims which the arbitrator rejected.

should be granted entirely against Crossman Co., because the employer caused whatever injury that Jones incurred.

A. Jones Has No Cause of Action under ERISA To Recover the Payments He Made to the Fund.

The Trustees, the arbitrator, Judge Green, and the Court of Appeals relied upon *Crown Cork & Seal Co. v. Teamsters Pension Trust Fund of Philadelphia & Vicinity*, 549 F. Supp. 307 (E.D. Pa. 1982), *aff'd mem.*, 720 F.2d 662 (3d Cir. 1983), in rejecting Jones' claim for restitution. That case arose when an employer made approximately $80,000 in inadvertent overpayments to the Fund and its sister fund, the Teamsters Health and Welfare Fund of Philadelphia & Vicinity. When the Trustees refused to repay the disputed sum voluntarily, the employer brought an action under, *inter alia*, ERISA. The District Court (Giles J.) dismissed the complaint for failure to state a claim upon which relief can be granted, and the Third Circuit Court affirmed.

Judge Giles first noted that an "examination of the statutory language shows that such a cause of action [for return of mistaken contributions] is not expressly granted" in ERISA. 549 F. Supp at 310-11. Thus, the issue was whether a cause of action could be implied from the statute. Judge Giles emphasized that in applying this analysis, "the central issue is congressional intent." *Id.* at 311. Nothing in the statute, its structure, or legislative history supported a remedy to force the return of contributions. Therefore, the complaint was dismissed. *Accord Dime Coal Co. v. Combs*, 796 F.2d 394, 396-400 (11th Cir. 1986).

In this appeal, Jones apparently concedes that ERISA does not create an express cause of action for restitution. However, he argues that *Crown Cork* does not apply to him because he is an "individual," as opposed to a corporation (Jurisdictional Statement at 7-8). Jones also cites several cases, most notably *Chase v. Western Conference of Teamsters Pension Trust Fund*, 753 F.2d 744 (8th Cir. 1985), for the proposition that *Crown Cork* was wrongly decided (Jurisdictional Statement at 7-10). In

Chase, the Eighth Circuit held that an employer could sue under ERISA to recover contributions that had been mistakenly paid to a multi-employer pension fund. *Chase* made no attempt to analyze the underlying legislative intent. Rather, the court simply concluded that "right of restitution" exists "when the equities favor it." 753 F.2d at 744.

Jones' arguments are undermined by *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), which considered whether a plan participant may recover punitive damages under § 409 of ERISA, 29 U.S.C. § 1109. ERISA does not expressly provide such relief. Therefore, as in this case, the Court was confronted with the question of whether the remedy could be inferred from the statute under "the analysis employed in *Cort v. Ash*, 422 U.S. 66, 78 (1975)." *Russell, supra*, 473 U.S. at 138. According to *Russell:*

> Relying on the four-factor analysis employed by the Court in *Cort v. Ash*, 422 U.S., at 78, respondent argues that a private right of action for extra-contractual damages should be implied even if it is not expressly authorized by ERISA. Two of the four *Cort* factors unquestionably support respondent's claim: respondent is a member of the class for whose benefit the statute was enacted and, in view of the preemptive effect of ERISA, there is no state-law impediment to implying a remedy. But the two other factors — legislative intent and consistency with the legislative scheme — point in the opposite direction. And "unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 94 (1981). "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California v. Sierra Club*, 451 U.S. 287, 297 (1981).

473 U.S. at 145 (footnote omitted).

Reviewing the legislative history, the Court found nothing which affirmatively supported the right to recover punitive damages. This silence was fatal to the plaintiff's case, because:

> The six carefully integrated civil enforcement provisions found in § 502(a) of the statute [*i.e.*, ERISA] as finally enacted, however, provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a "comprehensive and reticulated statute." *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980).

473 U.S. at 146. Consequently, the right to recover punitive damages was rejected.

Russell unequivocally supports the conclusion of *Crown Cork* that an implied remedy under ERISA will not be recognized absent affirmative proof in the language or history of the statute that Congress intended to create the remedy. This discredits the *Chase* analysis, which would recognize a right to restitution simply because a court feels that the "equities" support such relief.[6] As *Crown Cork* and *Dime Coal* correctly

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6. The other appellate cases cited by Jones to support the claim for restitution all suffer from the same defect as *Chase*, *i.e.*, failure to recognize that legislative intent is a prerequisite to the remedy. In *Peckham v. Board of Trustees*, 719 F.2d 1063 (10th Cir. 1983), for example, the court recognized a limited right to restitution without citing anything in the statute or its history to support the cause of action. In *Teamsters Local 639—Employees Health Trust v. Cassidy Trucking*, 646 F.2d 865, 867 (9th Cir. 1981), the court reached the same conclusion because it found nothing in the legislative history which was inconsistent with the remedy. This analysis, however, sets *Russell* on its head. *Russell* teaches that common law remedies, such as punitive damages or restitution, will not be recognized unless there is affirmative evidence of a legislative intent to create them.

Dumac Forestry Services v. IBEW, 814 F.2d 79, 82 (2d Cir. 1987) never decided the issue, since the pension fund in that case conceded that its refusal to return mistaken contributions was in fact subject to judicial review. Finally,

note, there is no evidence that Congress ever intended to create a right to recover mistaken pension contributions. Therefore, Jones has no cause of action in this case.

Similarly, *Russell* demonstrates that *Jones* cannot distinguish *Crown Cork* on the ground that he is an individual rather than a corporation. The plaintiff in *Russell* was a plan participant and, thus, was much more entitled to protection under ERISA than Jones, an independent contractor who had no right to benefits from the Fund. Nonetheless, this Court held that, absent the requisite legislative intent, no implied remedy for restitution will be recognized. The same result is appropriate in this case.

B. Even if a Cause of Action Did Exist for "Restitution," the Equities of the Situation Would Not Favor Relief.

Relief should be denied even if the Court were to find that a right to sue for return of mistaken contributions might exist in certain situations. Jones attempts to portray himself as an innocent victim of circumstances and contends that restitution is necessary to disgorge an unjust enrichment. The uncontroverted facts, however, reveal that considerations of equity and public policy would be flouted if he is permitted to recover the illicit payments made to the Fund.

First, the record demonstrates that the Fund is absolutely innocent of wrongdoing. Jones has never even suggested that any representative of the Fund sanctioned, or even had notice of, the self-pay scheme. Moreover, he has not articulated a legal basis for finding that the Fund violated any duty owed him.[7]

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in *Whitworth Brothers Storage Co. v. Central States, Southeast & Southeast Areas Pension Fund*, 794 F.2d 221 (6th Cir. 1986), the court conceded that nothing in ERISA explicitly or implicitly supports a right to recover mistaken contributions. The court, nevertheless, recognized such a right based on the basis of "federal common law." In other words, *Whitworth* stands for the proposition that federal courts can create remedies which Congress declined to establish. This blatant usurpation of legislative power is totally inconsistent with *Russell*.

7. The Jurisdictional Statement complains that "[o]ver the period of almost thirty (30) years, neither the employer, the Pension fund nor the union

Therefore, no policy would be served by granting an extra-statutory or unusual remedy against the Fund.

Second, a decision to restore benefits would sanction a serious violation of the law. Section 302(c)(5) of the LMRA limits contributions to multiemployer funds to contributions made by an employer "for the sole and exclusive benefit of the employees of such employer, and their families and dependents." Moreover, the "detailed basis on which such payments are to be made" must be "specified in a written agreement with the employer." This Court has construed the requirements of § 302(c)(5) strictly, recognizing that it is *illegal* for payments to be made to or from a benefit fund if the requirements of § 302(c)(5) are not satisfied. *Walsh v. Schlecht*, *supra*, 429 US. at 407.[8]

Jones and Crossman Co., however, consciously attempted to circumvent this policy — and the operative collective bargaining agreement — by their self-pay scheme. Such attempts to undermine collective bargaining agreements through use of owner-operators have constituted a serious threat to federal labor policy for many years. *See Teamsters v. Oliver*, 358 U.S. 283 (1959). A decision by this Court to render Jones "whole" would encourage similar schemes in the future by guaranteeing

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reported to William Jones on the status of his pension, whether vested or not." (Jurisdictional Statement 14). Section 105(a) of ERISA, however, specifically provides that the Fund need only provide such a statement to a "plan participant or beneficiary who so requests in writing." 29 U.S.C. § 1025(a). Since Jones never made such a request, the Fund never had a duty to make a report.

8. *Accord Trailway Lines v. Trailways, Inc. Joint Council*, 785 F.2d 101 (3d Cir. 1986); *Moglia v. Geohegan*, 403 F.2d 110, 116 (2d Cir. 1968), *cert. denied*, 394 U.S. 914 (1969) (multiemployer pension fund cannot pay benefit to widow of *bona fide* employee who was not covered by a written collective bargaining agreement); *Joint Council of Teamsters No. 42 v. Associated General Contractors*, 520 F. Supp. 3, 4-5 (C.D. Cal. 1980), *aff'd*, 662 F.2d 531 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982) (multiemployer fund cannot award pensions to owner-operators in the trucking industry who functioned as independent contractors); *Thurber v. Western Conference of Teamsters Pension Fund*, *supra*, 542 F.2d at 1109 (9th Cir. 1976); *Dohrer v. Wakeman*, 14 Wash. App. 157, 539 P.2d 91, 93-94 (1975).

that a perpetrator will either receive a pension to which he or she is not entitled or, at least, be restored to his or her previous position if the scheme is uncovered. Jones even has the temerity to demand interest. Obviously, such a result would contravene public policy.

Additionally, a precedent which permitted the return of such mistaken contributions could seriously injure the Fund's financial stability. In *Crown Cork*, Judge Giles observed that the return of mistaken contributions can "severely undermine" a "fund's integrity," because once such payments are invested, they become an integral part of the trust corpus. 549 F. Supp. at 312. A fund's actuary estimates funding needs on the basis of current assets. Unanticipated refunds which occur many years after payments have been incorporated into the trust corpus (and have thus provided the basis for years of actuarial estimates and trustee decisions concerning benefit levels) can seriously disrupt financial stability.

The real issue in this case is not the slightly more than $25,000 which Jones seeks. Most requested refunds involve sums which, *standing alone*, would not threaten the Fund. This Fund, however, has had many such claims, several of which have resulted in published judicial precedents. *McHugh v. Teamsters Pension Trust Fund of Philadelphia & Vicinity*, 638 F. Supp. 1036, 1048 (E.D. Pa. 1980) (approximately $165,000); *Crown Cork, supra*, 549 F. Supp. at 308, (approximately $80,000). If a general duty to refund were recognized, such claims would become aggregated, and the Fund would be thrown into chaos. [9] That result would not injure Mr. Schaffer or the Trustees, in their capacity as fiduciaries of the Fund. Rather, the only victims would be the real participants and beneficiaries who now or in the future will look to the Fund for benefits.

When all of these factors are taken into consideration, the Trustees' decision to deny "restitution" cannot be viewed as

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9. It is impossible to predict how much money might be demanded in refunds, because there is no way to estimate the number of such claims which may be made in the future.

arbitrary or capricious. Indeed, their decision would stand even if the Court applied a *de novo* standard.

C Any Relief That Is Granted Should Be Limited to an Award Against Crossman Co.

Should the Court find that Jones is completely innocent and deserving of restitution, then relief should be limited to recovery against Crossman Co. If Jones is blameless, then Crossman Co. is totally responsible for the self-pay scheme and the injury which allegedly flowed from it. Crossman Co., moreover, was enriched since it reaped all of the savings realized by the scheme.

For example, if Jones had remained a regular member of the bargaining unit, then Crossman Co. — not Jones — would have made the payments which Jones is now seeking to recover. The self-pay scheme enabled Crossman Co. to save other expenses incurred in connection with bargaining unit members, *e.g.*, the cost of workers' compensation insurance, holidays, social security tax contributions, maintenance of Jones' vehicle.

As an employer bound by the underlying collective bargaining agreements and the Pension Plan, Crossman Co. cannot seriously plead ignorance of the illegality of the self-pay arrangement. Furthermore, an award against the company would not have the untoward impact upon federal labor policy that would arise from a ruling adverse to the Fund.

IV. THE COMPLAINT FAILS TO STATE CLAIMS FOR RELIEF UNDER 42 U.S.C. §§ 1985(3) AND 1986.

Section 2 of the Ku Klux Klan Act of 1871, as codified at 42 U.S.C. § 1985(3)[10] was enacted to abolish the lingering affects of

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10. The Section provides, in relevent part:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to

slavery during the Reconstruction Era and proscribes conspiracies designed to frustrate that goal. Its specific purpose was "to combat the prevalent animus against Negroes and their supporters." *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825, 836 (1982). To state a cause of action under § 1985(3), a plaintiff must clearly demonstrate three essential elements:

> (1) that a federally secured right has been invaded by the defendants,
>
> (2) that the defendants conspired to deprive the plaintiff of [his or] her rights, and
>
> (3) that the defendants' actions were motivated by a class-based invidiously discriminatory animus . . .

Griffin v. Breckenridge, 403 U.S. 88, 102 (1971).

In the instant case, the complaint originally accused the defendants of engaging in a conspiracy to drain and deplete his finances because he was a commissioned driver.[11] Defendants

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all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

11. Paragraphs 29, 30 and 31 of Jones' complaint allege the following:

> 29. Since May, 1972, by reason of an unlawful conspiracy plan, plot, enterprise and scheme to drain and deplete the finances of plaintiff, defendants have wrongfully taken great sums of plaintiff's money aggregating many thousands of dollars.
>
> 30. Defendants have engaged in an unlawful conspiracy, enterprise and combination to dupe and trick plaintiff into making contributions to the Fund. The said conspiracy, enterprise and combination was an

moved to dismiss under the authority of *United Brotherhood of Carpenters v. Scott*, 463 U.S. 825 (1983), which involved a conspiracy by unions to harm non-union workers. The Supreme Court denied relief as a matter of law on the ground that the statute does not "reach conspiracies motivated by economic or commercial animus." *Id.* at 838. *Id.* at 839. Judge Green properly found *Scott* to be controlling, because any conspiracy against "commissioned drivers" would be a purely economic conspiracy of the type outside the statute's reach. The Court of Appeals affirmed.

Jones has never seriously disputed the fact that *Scott* utterly discredits his § 1985(3) count as pleaded. Rather, in the District Court he attempted to shift gears by arguing that the purported conspiracy really constituted age discrimination and race discrimination because commissioned drivers are usually older or black. Judge Green, and subsequently the Court of Appeals, rejected this attempted recharacterization on two grounds. First, the statements in the affidavit were never incorporated into the complaint. Second, as Judge Green noted, "[t]he record discloses that [Jones] was denied benefits because he was not a member of a bargaining unit described in the collective bargaining agreement" (App. 6-7).

The second point is particularly important, because it demonstrates that Jones' claim could not have succeeded even if he had amended his complaint. The Trustees' decision to limit participation in the Fund to *bona fide* members of a bargaining unit has nothing to do with racial animus. As previously explained, § 302(c)(5) of the LMRA commands the Trustees to limit participation to bargaining unit members. *Walsh v. Schlecht*, *supra*, 429 U.S. at 407; *Trailways*, *supra*, 785 F.2d at

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NOTES *(Continued)*

invidious discrimination against drivers who became 'Commissioned drivers.'

31. Defendants each and every one of them, having knowledge of the wrongs being done to plaintiff, and having the power or authority to prevent or stop the commission of the wrongs, have neglected and willfully refused to act in preventing, or stopping the wrongs being done. (A.5-6).

106-08; *Moglia, supra*, 403 F.2d at 116. The Trustees of this Fund, moreover, have enforced this requirement with respect to all participants, regardless of race. *E.g., Blofsen v. Cutaiar*, 460 Pa. 411, 333 A.2d 841 (1975); *McHugh v. Teamsters Pension Trust Fund of Philadelphia & Vicinity, supra*, 638 F. Supp. at 1036; *Cage v. Teamsters Pension Trust Fund of Philadelphia and Vicinity*, 18 D.&C.3d 340 (Phil. 1981). Hence, the suggestion of a civil rights claim is pure illusion.[12]

V. JONE'S STATE LAW CLAIMS ARE PREEMPTED BY ERISA.

It is undisputed that the Fund is a multiemployer benefit plan under ERISA (App. 2). This fact dooms the various state law claims raised by Jones.

Section 514(a) of ERISA contains broad, sweeping, preemptory language which declares that ERISA shall, "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). This Court has interpreted this language in an expansive manner, especially when a plaintiff is attempting to recover from an ERISA plan. In *Pilot Life Insurance v. Dedeaux*, 107 S.Ct. 1549 (1987), for example, the plaintiff sued an ERISA fund for benefits and other financial relief under several state law tort theories. The Court held that any state law which authorized a cause of action to recover from a plan for "alleged improper processing of a claim

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12. The civil rights claim fails for an additional reason. Jones' attempt to allege racial discrimination is basically a disparate impact claim. In essence, he alleges that the defendants intended to injure commission drivers, a majority of whom happened to be black or otherwise protected by the statute. To state a claim under § 1985(3), however, Jones would have to allege that the original purpose of the self-pay scheme was to injure blacks. *Griffin v. Breckenridge, supra*, 403 U.S. at 102. Since no such allegation has been made, no valid § 1985(3) claim has been averred.

The Court of Appeals correctly noted that since 42 U.S.C. § 1986 simply creates a cause of action for violations of § 1985(3), the demise of the § 1985(3) claim necessarily ended the § 1986 claim.

for benefits" would "undoubtedly meet the criteria for preemption under § 514(a)." *Id.* at 1553. *Accord, Metropolitan Life Insurance Co. v. Taylor*, 107 S. Ct. 1542 (1987).

However they are articulated, Jones' state law theories simply constitute an attempt to use state law to remedy "alleged, improper processing of a claim for benefits." *Dedeaux* and *Taylor* teach that state law cannot affect an ERISA plan's obligation, or lack of obligation, to pay claims. *Accord Shaw v. Delta Air Lines*, 463 U.S. 85 (1983) (invalidating state statute which required ERISA fund to pay pregnancy benefits). Therefore, the Court of Appeals' decision to hold Jones' state law claims preempted is beyond reproach.

VI. IF THE JURISDICTIONAL STATEMENT IS TREATED AS A PETITION FOR A WRIT OF CERTIORARI, THEN THE PETITION SHOULD BE DENIED.

The defects in Jones' appeal would not be cured by treating his appeal as a petition for a writ of certiorari. As explained above, Jones' arguments lack merit under the decisions of this Court. Thus, the case is not a vehicle for resolution of important issues.

Futhermore, after the Court of Appeals issued its ruling, the parties affiliated with the Fund moved for publication of the opinion. The motion was denied (Jurisdiction Statement at 1, 7). As a result of this refusal to publish, the Court of Appeals' opinion is not a binding precedent of the Third Circuit. *See* § VIII(C) of the Third Circuit's Internal Operating Procedures. *See also* V(F) of the Third Circuit's Internal Operating Procedures ("An opinion which appears to have value only to the trial court or to parties is ordinarily not published"). In short, the opinion below is simply the adjudication of one pension claim in a highly specific factual situation. As such, the case is not worthy of this Court's consideration.

CONCLUSION

For the foregoing reasons, Messrs. Schaffer, Lemon, Cardullo, Coyle, Fox, Cimino, and Dagen request this Court to dismiss the appeal or to affirm the ruling below. Alternatively, this Court is asked to deny the petition for writ of certiorari.

Respectfully submitted,

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